Competitive Common Carrier Proceeding, the Commission concluded that "dominant carriers" were common carriers that have "market power" (i.e. the ability to control price).[56] The Commission described "market power" and its significance for regulation of common carrier rates as follows:

> Market power refers to the control a firm can exercise in setting the price of its output. A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. This may entail setting price above costs in order to earn supranormal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competitors. In contrast, a competitive firm, lacking market power, must take the market price as given, because if it raises price it will face an unacceptable loss of business, and if it lowers its price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price.[57]

The Commission identified certain market features as being determinants of a firm's ability to exercise market power. These identified features include the following: 1) the number and size distribution of competing firms; 2) the nature of barriers to entry; 3) the availability of reasonably substitutable services; and 4) control of bottleneck facilities.[58]

Carriers deemed to lack market power and therefore considered to be non-dominant based upon the foregoing criteria have, since 1980, been subject to streamlined rate regulation. Under streamlined regulation, those carriers' rates are presumptively lawful and need not be cost justified. They are not subject either to rate of return regulation or to price cap regulation.[59] OSPs -- dominant and non-dominant -- are statutorily required to file tariffs.[60] Specifically,

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56 *Id.* at 20.

57 *Id.*

58 *Id.*

59 Non-dominant carriers, including OSPs, are subject to the statutory requirements that their rates be just and reasonable (47 U.S.C. § 201(b)), and that they not be unreasonably discriminatory (47 U.S.C. § 202(a)). They are also subject to the Commission's formal complaint process codified at Section 208 of the Communications Act (47 U.S.C. § 208). The complaint process remains available for consumers to seek redress against rates or other practices of OSPs.

60 47 U.S.C. § § 203(a), 226(h).

Section 226(h) of the Act (the TOCSIA provisions) require OSPs to file with the Commission and to maintain informational tariffs containing rates, terms and conditions.

Application of the Commission's 1980 market power criteria to the so-called "third tier OSPs" leads to the conclusion that none of those companies are able to exercise market power. There are numerous such competing firms, and none of the third tier OSPs serve more than a tiny fraction of the interstate interexchange calling market. There are few barriers to entry. There are many reasonably substitutable services. In addition to the operator-assisted calling services, available both on a 0+ basis from the presubscribed carrier and on a dial up basis from other OSPs, there are prepaid calling card services, coin sent-paid (1+) services, and mobile services (e.g. cellular, PCS). Finally, third tier OSPs do not control bottleneck facilities (i.e. facilities through which potential competitors must have access in order to provide service).

In its 1989 TRAC decision,[61] the Commission determined that OSPs were non-dominant carriers. That determination was premised upon application of the market power-based criteria for measuring dominance/non-dominance established in the Competitive Common Carrier Proceeding. In TRAC, the Commission also declined to reclassify certain OSPs as dominant carriers. Moreover, it expressly declined to determine those OSPs' rates to be "unjust and unreasonable" based on the rates of other carriers.[62] Yet, such rate determinations -- or even presumptions -- based on the rates of other carriers, especially dominant carriers, would be an inevitable result if any of the rate cap proposals recommended in this proceeding were to be implemented.

Significantly, the TRAC case was decided by the Commission in February 1989 -- before passage of TOCSIA and promulgation of the operator service rules. Prior to TOCSIA and the operator service rules, it was far more difficult for consumers to use their preferred carrier from

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61 Telecommunications Research and Action Center, *etal* v. Central Corporation, *etal*, 4 FCC Rcd 2157 (1989) ("TRAC").

62 *Id.* at 2158.

telephones provided by aggregators than it is today. At that time, access to reasonably substitutable services was limited, and, without mandatory access code dialing availability and unblocking, OSPs and aggregators arguably could be said to have had control of "bottleneck" facilities. Now that many substitutable services are readily available to all consumers and unblocked aggregator telephones is the "law of the land," there is no basis for a determination that third tier OSPs possess any indicia of market power, and, correspondingly, there is no justification under long adhered-to principles of dominant/non-dominant carrier regulation for the Commission to impose wasteful and inefficient rate regulation on any non-dominant carriers, including third-tier OSPs.[63]

VII. IF BPP IS TO BE IMPLEMENTED, IT MUST INCLUDE 14 DIGIT SCREENING AND FULL BALLOTING

The record against BPP compiled in this proceeding is overwhelming. Based upon the comments submitted, it is clear that the costs would be astronomical, the benefits non-existent to dubious, and its scope, irrespective of costs, would be limited. Accordingly, the Commission should not require the telephone industry to expend the resources to implement BPP. If, however, the Commission chooses to disergard that record and proceed with its BPP proposal, then it must impose requirements which ensure that BPP is implemented in a manner which promotes competition rather than disadvantages competitors, and that it ensure that consumers are afforded fair opportunities to exercise informed choices. While these standards may seem simple, they will not be attained if BPP is implemented in the manner proposed by most LECs and by other BPP proponents. This is especially so with respect to two aspects of BPP implementation -- 14 digit screening and customer selection.

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63 Direct regulation of OSP rates would undermine one of the Commission's anticipated benefits of BPP. One of those stated benefits is that BPP would "reduce regulatory costs." (Further Notice at ¶ 17). It is difficult to imagine how a system of mandatory rate case filing and review proceedings for any OSP rates which happened to exceed some arbitrarily-set level would result in anything but significant increases in regulatory costs, both for the Commission and for the industry.

Most LECs who have addressed the issue have urged the Commission not to require them to implement BPP with 14 digit screening. Instead, they want to use 10 digit screening. According to those LECs, 14 digit screening would increase the costs of BPP, increase the risk of fraud, and would delay its implementation. Oncor does not question that 14 digit screening would increase BPP costs, and would delay implementation. Nonetheless, irrespective of cost and delay, 14 digit screening is necessary to prevent calling card-issuing LECs from retaining a *de facto* monopoly in the issuance of line number-based calling cards. With 14 digit screening, any issuer of calling cards, including all IXC/OSPs, can issue line number-based calling cards, with card-specific personal identification numbers (PINs). With 10 digit screening, only one entity can issue a line number-based card. Inasmuch as LECs have already distributed millions of line number-based cards to their local exchange customers, it is not difficult to determine whose line number-based cards most consumers would carry.

One LEC, Pacific Bell, has proposed a two carrier card system. Under that system, two carriers -- a LEC and one (and only one) IXC could issue line number-based calling cards using the same PIN to a customer. This system would preclude more than one IXC from offering customers a line number-based card. Moreover, that system would preclude competition between the line number-based card-issuing LEC and the line number-based card-issuing IXC for intraLATA calling, despite the fact that intraLATA competition between LECs and IXCs is permitted in most states. The two-card system would also create a competitive windfall for Pacific and the other BOCs if and when they are allowed to provide interexchange services. Under that system, the BOC would have an embedded base of line number-based calling card customers comprising the entirety of the calling card holders in its local exchange service area on the day that it becomes an IXC. That would enable those LECs to enjoy a significant advantage over their IXC competitors in the marketing of calling card-based interexchange services.

Similarly, LEC commenters and others object to implementing BPP in a manner which includes full balloting. Several LECs would limit BPP implementation to one time notification

to end users of the right to select a preferred 0+ carrier, followed by default of nonresponding end users to their presubscribed carrier.[64] Some LECs candidly recognize that there will be little response to customer notifications. Based upon the experience with presubscription in the mid-1980s, that is probably correct. That is why the Commission deemed it necessary to require full balloting and allocation -- to promote competition and eliminate default of the majority of customers to the incumbent carrier.[65] Today, the situation with operator-assisted service is comparable with the 1+ market a decade ago. The only difference is that, instead of one carrier enjoying a virtual monopoly of the presubscribed market, the 0+ market is dominated by three carriers.

One of the Commission's stated motivations for proposing BPP is to force OSPs to refocus their marketing efforts on end users, rather than on aggregators based on commissions.[66] If the Commission is to implement a system which requires OSPs to refocus their marketing efforts toward end users, those OSPs doing the refocusing should not be competitively disadvantaged from the outset. Yet, that is precisely what would happen if BPP were to be implemented in a manner which would enable consumers to avoid having to make affirmative choices and to "default" their operator-assisted calling to their incumbent 1+ carriers. If the Commission's intent is to promote opportunities for competition in the provision of operator services through BPP, then BPP must be designed to require consumers to make affirmative choices among competitors -- as they did with respect to 1+ presubscription a decade ago. BPP without full balloting and allocation of non-balloting customers among all providers of operator services will relegate the operator service market to being an adjunct of the 1+ market, with the incumbent 1+ carriers inheriting their 1+ customer bases as presubscribed operator service customers as well.

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64 See, e.g., comments of GTE at 16, Ameritech at 15-16.

65 Investigation of Access and Divestiture Related Tariffs, 101 FCC2d 911, *recon.*, 102 FCC2d 903 (1985).

66 Further Notice, *supra*, at ¶ ¶ 2, 9.

The motivation for proposing such minimal notification procedures is clear: to keep BPP cost estimates as low as possible in order to make BPP appear less costly to the Commission. However, if BPP is worth doing, it is worth doing correctly. If it cannot be implemented in a manner which creates a level playing field in the calling card services market, and which affords all providers of operator services a fair and equal opportunity to compete with the incumbent 1+ presubscribed carriers for the operator assisted calling business of end users, then it is not worth implementing at any price.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Oncor's initial comments and those of most other commenters, the record established in this proceeding demonstrates that billed party preference would be a very costly service to implement, that it would produce few, if any, public interest benefits not otherwise attainable, and that it would undermine development of competition in the provision of operator-assisted services. Accordingly, Oncor respectfully urges the Commission not to require the implementation of billed party preference, to address and resolve the CIID card validation issues pending in this docket at the earliest practicable time, and then to promptly terminate this proceeding.

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September 14, 1994

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I, Michelle D. O'Brien, hereby certify that I have on this 14th day of September 1994, copies of the foregoing *Reply Comments of Further Notice of Proposed Rulemaking* were served by first class mail, postage prepaid, upon the following attached list.

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